Swiss Planner Sdn Bhd v Plush Dollar (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — WRIT SUMMONS NO WA-22NCVC-778–11 OF 2018
MOHD ARIEF JC
4 APRIL 2022

Landlord and Tenant — Tenancy — Breach of agreement — Failure to pay rentals — Failure to return vacant possession — Whether there was breach of tenancy agreement by defendants — Whether obligation to obtain approval from state authority for the use of premises lay with plaintiff or defendants — Whether obligation to make payment of rentals were conditional upon the obtainment of approval to use premises from state authority — Whether defendants had validly terminated terms of tenancy — Whether defendants liable for full terms of tenancy including renewed tenancy — Whether plaintiff entitled to terminate tenancy when plaintiff elected not to accept earlier termination of tenancy by defendants — Whether plaintiff entitled to claim full sums due under original tenancy period and under renewed tenancies period — Whether second defendant liable as guarantor and under tenancy agreement — Contracts Act 1950 s 74

The plaintiff and a company known as Nirwana Academy Sdn Bhd ('Nirwana') had entered into a tenancy agreement for the ground floor, mezzanine floor, ninth floor, 22nd floor and 23rd floor ('the premises') of the plaintiff's building known as Plaza Pengkalan. Due to Nirwana's failure to pay the rentals to the plaintiff, the latter instituted proceedings which ended up with the winding up of Nirwana. Subsequently, the plaintiff and the first defendant entered into a tenancy agreement regarding the same premises which was secured by a guarantee given by the second defendant. This new tenancy was for a period of 11 months with an automatic renewal of a further two consecutive terms of three years and a final term of one year and the purpose of the tenancy was for the defendants to run the Nirwana College. The dispute between the parties started when the first defendant failed to pay the rentals and attempted to wrongly terminate the tenancy for the ground floor, mezzanine floor and the ninth floor of the building. The plaintiff's action against the defendants for summary judgment was unsuccessful as the court found several issues to be tried. The plaintiff then terminated the tenancy agreement and demanded vacant possession of the premises from the first defendant. Due to the breach of the tenancy agreement by the defendants, the plaintiff filed the present action against the defendants and claimed for: (a) rentals for the period between May 2016 to May 2021 — RM7,700,720.80; (b) interest accrued as at 9 June 2021 — RM1,906,212.64; (c) sewerage charges from May 2016 to June 2021 — RM233,514.48; (d) loss of rentals from 1 June 2021 to 15 April 2024 — RM5,103,050.06; (e) the defendants to be directed to redeliver the vacant

possession of the premises in their original condition and good tenantable repair within seven days from the date of judgment; (f) alternatively, an order that the plaintiff be at liberty to carry out the restoration work and the costs of the same to be borne by the defendants subject to the said costs to be assessed by the court; (g) costs of the proceedings; and (h) interest. The defendants' defences against the plaintiff's action had raised the following issues: (i) whose obligation to apply for approval from Dewan Bandaraya Kuala Lumpur ('DBKL'); (ii) whether the rentals became due when Nirwana operated again or whether it was part of the terms of settlement of the earlier dispute between the plaintiff and Nirwana; (iii) whether the defendants had validly terminated the terms of the tenancy via its notice dated 12 April 2017; (iv) whether the defendants were liable for the full term of the tenancies including the renewed terms of the tenancy for the premises; (v) whether the plaintiff was entitled to terminate the tenancy when the plaintiff did not accept the earlier termination of the tenancy by the defendants — the doctrine of election; (vi) whether the plaintiff was entitled to claim the full sums due under the original tenancy period and under the renewed tenancies period; (vii) the issue of vacant possession; and (viii) the liability of the second defendant.

Held, allowing the plaintiff's claim:

(1) The first defendant had failed to pay the rentals and all sums due under the terms of the tenancy agreement from its inception. Even the second defendant admitted that the rentals had not been paid. Therefore, the plaintiff had proven that the defendants did commit a breach of the tenancy agreement (see paras 20, 25 & 28).

(2) The court did not find that the statements made by the defendants' witnesses were correct. The representations of the facts contradicted the contemporary documents and were contrary to the terms of the tenancy agreement. It was clear that under the terms of the tenancy agreement, the obligation to obtain such approvals from any authorities for the use of the premises for the needs of the first defendant lay with the defendants and not with the plaintiff (see paras 34 & 39).

(3) The contemporaneous documents indicated that the rentals were payable irrespective of the status of the approval from DBKL or the status of Nirwana. The tenancy agreement did not provide for any condition precedent to the obligation to pay the rentals from the defendants to the plaintiff. This was merely an afterthought on the part of the defendants. It was not the function of the court to rewrite the terms of the bargain as recorded in the tenancy agreement (see paras 48 & 55).

(4) The grounds relied on by the defendants did not justify the termination of the tenancy for the ground floor, the mezzanine floor and the ninth floor of the building. As the court had found earlier, the issue of the continuation or resurrection of Nirwana was not supported by the

contemporaneous documents and did not appear in the contract and the obligation to obtain approval from DBKL lay with the defendants, and it did not preclude the operation or payment of the rentals by the defendants. Therefore, the plaintiff was entitled not to accept the termination of the tenancy agreement by the first defendant. The court also found that the defendants did not deliver vacant possession of the said three floors to the plaintiff despite the notice dated 12 April 2017. Therefore, the said tenancies continued despite the aforesaid notice from the first defendant (see paras 63–65 & 72).

(5) As the court had found earlier, the defendants had failed to pay any of the rentals due and all outgoings from the inception of the tenancy agreement. The notice to terminate by the plaintiff was not dependent on the election made by the plaintiff earlier. The right to terminate arose independently because of the continued failure by the defendants to pay the rentals due. Therefore, the defendants' argument on the inability of the plaintiff to terminate on their reliance on the doctrine of election was incorrect (see para 81).

(6) The court was of the opinion that section 9.05 read together with section 9.02 of the tenancy agreement rendered the right to decide whether to terminate the automatic renewal of the tenancy lay with the plaintiff. The parties did agree that the tenancy period shall be automatically renewed at the end of the first period until 15 April 2017. This would then be renewed for two consecutive terms of three years each and a final term of one year. The second tenancy period had since been terminated by the plaintiff in accordance with section 9.02. The defendants had only returned possession of the premises to the plaintiff on 8 October 2021 when the keys were returned to the plaintiff's solicitors. In the circumstances, the defendants were required to pay rentals due to the plaintiff including all charges, which included but not limited to the sewerage charges, from May 2016 to 8 October 2021. Further, based on section 9.02(b), as the plaintiff did terminate the tenancy, the remaining tenancy came to an end (see paras 87–88 & 90–92).

(7) There was no clause in the tenancy agreement that entitled the plaintiff to claim liquidated damages against the defendants, as such, the plaintiff must prove its entitlement for such losses for the remainder of the tenancy period under s 74 of the Contracts Act 1950. However, in the circumstances of the case, the plaintiff was not entitled to claim for the full rentals after 8 October 2021 to May 2024 because the plaintiff had failed to produce evidence of the loss of profits or the difference in the rentals that it could now obtain based on current market rates compared to those agreed by the defendants. After all, the premises had already in the control of the plaintiff and if the court were to grant damages for the

full rentals there was a danger that the plaintiff would be doubly compensated for the said premises (see paras 93–94 & 99).

(8) Section 7.32 of the tenancy agreement required that the first defendant must surrender the premises rented in a state of good tenantable repair and that the first defendant must restore the premises to its original condition if any alterations or additions were made. However, based on the evidence, the defendants had refused to honour the first defendant's obligations under section 7.02. In the circumstances, the court found that the plaintiff was entitled to an order allowing it to make such repairs on behalf of the defendants and then claim the amount paid by the plaintiff to rectify the premises and units to its original state. The plaintiff would then be required to file the necessary assessment application to determine the amount payable for the said rectification work (see paras 102–105).

(9) As provided under the terms of the tenancy agreement, the liability of the second defendant must be preceded by a demand of the sums outstanding to him. Save for the letter dated 3 October 2018, no other demands were made against the second defendant. Under the circumstances, the court was constrained to only grant damages to the sum of RM4,596,510.40 as demanded in the letter dated 3 October 2018 against the second defendant (see paras 110 & 112).

[Bahasa Malaysia summary

Plaintif dan sebuah syarikat yang dikenali sebagai Nirwana Academy Sdn Bhd ('Nirwana') telah memeterai perjanjian penyewaan untuk tingkat bawah, tingkat mezanin, tingkat sembilan, tingkat 22 dan tingkat 23 ('premis-premis tersebut') bangunan plaintif yang dikenali sebagai Plaza Pengkalan. Disebabkan oleh kegagalan Nirwana untuk membayar sewa kepada plaintif, plaintif telah memulakan prosiding yang berakhir dengan penggulungan Nirwana. Selepas itu, plaintif dan defendan pertama menandatangani perjanjian penyewaan berhubung premis-premis yang sama yang dijamin dengan jaminan yang diberikan oleh defendan kedua. Penyewaan baharu ini adalah untuk tempoh 11 bulan dengan pembaharuan automatik selama dua penggal berturut-turut selama tiga tahun dan penggal terakhir selama setahun dan tujuan penyewaan adalah untuk defendan-defendan mengendalikan Kolej Nirwana. Pertikaian antara kedua-dua pihak bermula apabila defendan pertama gagal membayar sewa dan cuba untuk menamatkan secara salah penyewaan untuk tingkat bawah, tingkat mezanin dan tingkat sembilan bangunan tersebut. Tindakan plaintif terhadap defendan-defendan untuk penghakiman ringkas tidak berjaya kerana mahkamah mendapati beberapa isu untuk dibicarakan. Plaintif kemudiannya menamatkan perjanjian penyewaan tersebut dan menuntut pemilikan kosong premis-premis tersebut daripada defendan pertama. Disebabkan pelanggaran perjanjian penyewaan tersebut oleh defendan-defendan, plaintif telah memfailkan tindakan semasa terhadap

defendan-defendan dan menuntut: (a) sewa untuk tempoh antara Mei 2016 hingga Mei 2021 — RM7,700,720.80; (b) faedah terakru pada 9 Jun 2021 — RM1,906,212.64; (c) caj pembetungan dari Mei 2016 hingga Jun 2021 — RM233,514.48; (d) kehilangan sewa dari 1 Jun 2021 hingga 15 April 2024 — RM5,103,050.06; (e) defendan diarahkan untuk menyerahkan semula pemilikan kosong premis-premis tersebut dalam keadaan asalnya dan dibaiki dengan elok kepada keadaan asal dalam masa tujuh hari dari tarikh penghakiman; (f) sebagai alternatif, perintah supaya plaintif bebas untuk menjalankan kerja pemulihan dan kos yang sama akan ditanggung oleh defendan-defendan tertakluk kepada penilaian kos oleh mahkamah; (g) kos prosiding; dan (h) faedah. Pembelaan defendan-defendan terhadap tindakan plaintif telah menimbulkan isu-isu berikut: (i) siapa yang berkewajipan untuk memohon kelulusan daripada Dewan Bandaraya Kuala Lumpur ('DBKL'); (ii) sama ada sewa tersebut perlu dibayar apabila Nirwana beroperasi semula atau sama ada ia adalah sebahagian daripada syarat penyelesaian pertikaian terdahulu antara plaintif dan Nirwana; (iii) sama ada defendan-defendan telah menamatkan secara sah terma-terma penyewaan melalui notisnya bertarikh 12 April 2017; (iv) sama ada defendan-defendan bertanggungjawab untuk tempoh penuh penyewaan termasuk tempoh penyewaan yang diperbaharui untuk premis-premis tersebut; (v) sama ada plaintif berhak untuk menamatkan penyewaan tersebut sedangkan plaintif tidak menerima penamatan awal penyewaan oleh defendan-defendan — doktrin pemilihan; (vi) sama ada plaintif berhak menuntut jumlah penuh yang perlu dibayar di bawah tempoh penyewaan asal dan di bawah tempoh penyewaan yang diperbaharui; (vii) isu berkenaan pemilikan kosong; dan (viii) liabiliti defendan kedua.

Diputuskan, membenarkan tuntutan plaintif:

(1) Defendan pertama telah gagal membayar sewa dan semua jumlah yang perlu dibayar di bawah terma-terma perjanjian penyewaan sejak dari awal lagi. Malah defendan kedua mengakui bahawa sewa masih belum dibayar. Oleh itu, plaintif telah membuktikan bahawa defendan-defendan telah melakukan pelanggaran perjanjian penyewaan tersebut (lihat perenggan 20, 25 & 28).

(2) Mahkamah tidak mendapati bahawa kenyataan yang dibuat oleh saksi-saksi defendan adalah betul. Penyataan fakta yang dibuat bercanggah dengan dokumen kontemporari dan bertentangan dengan terma-terma perjanjian penyewaan. Adalah jelas bahawa di bawah terma-terma perjanjian penyewaan, kewajipan untuk mendapatkan kelulusan sedemikian daripada mana-mana pihak berkuasa bagi penggunaan premis untuk keperluan defendan pertama terletak pada defendan-defendan dan bukan pada plaintif (lihat perenggan 34 & 39).

(3) Dokumen kontemporari menunjukkan bahawa sewa perlu dibayar tanpa

mengira status kelulusan daripada DBKL atau status Nirwana. Perjanjian penyewaan tersebut tidak memperuntukkan apa-apa syarat terdahulu kepada kewajipan membayar sewa daripada defendan-defendan kepada plaintif. Ini hanyalah pemikiran terkemudian di pihak defendan-defendan. Bukan fungsi mahkamah untuk menulis semula syarat-syarat tawar-menawar seperti yang direkodkan dalam perjanjian penyewaan tersebut (lihat perenggan 48 & 55).

(4) Alasan yang disandarkan oleh defendan-defendan tidak mewajarkan penamatan penyewaan untuk tingkat bawah, tingkat mezanin dan tingkat sembilan bangunan tersebut. Seperti yang didapati oleh mahkamah sebelum ini, isu-isu penerusan atau kebangkitan Nirwana tidak disokong oleh dokumen kontemporari dan tidak terdapat dalam kontrak dan kewajipan untuk mendapatkan kelulusan daripada DBKL terletak pada defendan-defendan, dan ia tidak menghalang operasi atau pembayaran sewaan oleh defendan-defendan. Oleh itu, plaintif berhak untuk tidak menerima penamatan perjanjian penyewaan oleh defendan pertama. Mahkamah juga mendapati bahawa defendan-defendan tidak menyerahkan milikan kosong bagi ketiga-tiga tingkat tersebut kepada plaintif walaupun notis bertarikh 12 April 2017 telah diberikan. Oleh itu, penyewaan tersebut telah diteruskan tanpa mengira notis daripada defendan pertama (lihat perenggan 63–65 & 72).

(5) Seperti yang telah didapati oleh mahkamah sebelum ini, defendan-defendan telah gagal membayar mana-mana sewa yang perlu dibayar dan semua perbelanjaan dari permulaan perjanjian penyewaan lagi. Notis penamatan oleh plaintif tidak bergantung kepada pemilihan yang dibuat oleh plaintif sebelum ini. Hak penamatan tersebut timbul secara bebas disebabkan oleh kegagalan berterusan defendan-defendan untuk membayar sewa yang perlu dibayar. Oleh itu, hujah defendan-defendan mengenai ketidakupayaan plaintif untuk menamatkan sewaan berdasarkan pergantungan mereka pada doktrin pemilihan adalah tidak betul (lihat perenggan 81).

(6) Mahkamah berpendapat bahawa seksyen 9.05 dibaca bersama seksyen 9.02 perjanjian penyewaan tersebut memberikan hak kepada plaintif untuk memutuskan sama ada untuk menamatkan pembaharuan automatik penyewaan tersebut. Pihak-pihak bersetuju bahawa tempoh penyewaan akan diperbaharui secara automatik pada penghujung tempoh pertama sehingga 15 April 2017. Ini kemudiannya akan diperbaharui untuk dua penggal berturut-turut selama tiga tahun setiap satu dan penggal terakhir selama satu tahun. Tempoh penyewaan kedua kemudiannya telah ditamatkan oleh plaintif mengikut seksyen 9.02. Defendan-defendan hanya memulangkan pemilikan premis tersebut kepada plaintif pada 8 Oktober 2021 apabila kunci dikembalikan kepada peguamcara plaintif. Dalam keadaan tersebut, defendan-defendan

dikehendaki membayar sewa yang terhutang kepada plaintif merangkumi semua caj, termasuk tetapi tidak terhad kepada caj pembetungan, dari Mei 2016 hingga 8 Oktober 2021. Selanjutnya, berdasarkan seksyen 9.02(b), memandangkan plaintif telah menamatkan penyewaan, baki tempoh penyewaan telah tamat (lihat perenggan 87–88 & 90–92).

(7) Tiada klausa dalam perjanjian penyewaan tersebut yang melayakkan plaintif menuntut ganti rugi tertentu dan ditetapkan terhadap defendan-defendan, oleh itu, plaintif mesti membuktikan kelayakannya untuk menerima ganti rugi tersebut untuk baki tempoh penyewaan di bawah s 74 Akta Kontrak 1950. Walau bagaimanapun, dalam keadaan kes, plaintif tidak berhak untuk menuntut sewa penuh selepas 8 Oktober 2021 hingga Mei 2024 kerana plaintif telah gagal untuk mengemukakan keterangan berkenaan kehilangan keuntungan atau perbezaan dalam sewa yang boleh diperolehnya sekarang berdasarkan kadar pasaran semasa berbanding yang dipersetujui oleh defendan-defendan. Lagipun, premis tersebut telah pun berada dalam kawalan plaintif dan jika mahkamah memberikan ganti rugi untuk sewa penuh terdapat bahaya bahawa plaintif akan diberi pampasan dua kali ganda untuk premis-premis tersebut (lihat perenggan 93–94 & 99).

(8) Seksyen 7.32 perjanjian penyewaan tersebut menghendaki defendan pertama mesti menyerahkan premis yang disewa dalam keadaan baik pulih yang boleh disewakan dan defendan pertama mesti memulihkan premis tersebut kepada keadaan asalnya jika terdapat apa-apa perubahan atau penambahan dibuat. Bagaimanapun, berdasarkan keterangan, defendan-defendan telah enggan untuk mematuhi kewajipan defendan pertama di bawah seksyen 7.02. Dalam keadaan tersebut, mahkamah mendapati bahawa plaintif berhak untuk mendapat perintah yang membenarkannya membuat apa-apa pembaikan bagi pihak defendan-defendan dan kemudian menuntut jumlah yang dibayar oleh plaintif untuk membetulkan premis-premis dan unit-unit tersebut kepada keadaan asal. Plaintif kemudiannya dikehendaki memfailkan permohonan penilaian yang diperlukan untuk menentukan jumlah yang perlu dibayar untuk kerja pembaikan tersebut (lihat perenggan 102–105).

(9) Seperti yang diperuntukkan di bawah terma-terma perjanjian penyewaan tersebut, liabiliti ke atas defendan kedua mesti didahului dengan tuntutan jumlah yang tertunggak kepadanya. Selain daripada surat bertarikh 3 Oktober 2018, tiada tuntutan lain dibuat terhadap defendan kedua. Di bawah keadaan tersebut, mahkamah terkekang untuk hanya memberikan ganti rugi bagi jumlah RM4,596,510.40 seperti yang dituntut dalam surat bertarikh 3 Oktober 2018 terhadap defendan kedua (lihat perenggan 110 & 112).]

Cases referred to

Armagas Ltd v Mundogas (The Ocean Frost) [1985] 1 Lloyd's Rep 1, HL (refd)
Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (refd)
Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)
Cahaya Berlian Sdn Bhd v Bandar Kuala Lumpur [2021] 1 LNS 839, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Gestmin SGPS SA v Credit Suisse (UK) Ltd and another [2013] EWHC 3560 (Comm), QBD (folld)
Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd [2021] 5 MLJ 590; [2021] 10 CLJ 31, CA (refd)
Lee Soh Hua v Kow Lup Piow & Ors [1984] 2 MLJ 101; [1984] 1 CLJ Rep 191, FC (refd)
Mintye Properties Sdn Bhd v Yayasan Melaka [2006] 6 MLJ 420; [2006] 4 CLJ 267, CA (refd)
Mumtaz Properties Ltd; Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed and others, Re [2011] EWCA Civ 610, CA (refd)
Simetra Global Assets Ltd and another company v Ikon Finance Ltd and others [2019] EWCA Civ 1413, CA (refd)
Wong Yee Boon v Gainvest Builders (M) Sdn Bhd [2020] 3 MLJ 571; [2020] 2 CLJ 727, FC (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 ss 91, 92

Tharminder Singh (with Melissa Jacob Thomas) (Izral Partnership) for the plaintiff.
Rajenthira Kumar (with Hiu Yeat Fong) (Kumar & Assoc) for the defendants.

Mohd Arief JC:

INTRODUCTION

Background facts

[1] The plaintiff is the landlord and the owner of the building known as Plaza Pengkalan located at Batu 3, Jalan Ipoh, 51100 Kuala Lumpur.

[2] The plaintiff and a company known as Nirwana Academy Sdn Bhd had entered into a tenancy agreement dated 27 February 2014 regarding the ground floor, mezzanine floor, ninth, 22nd, and 23rd floor of the Plaza Pengkalan.

[3] The above-referred tenancy was for a period of three years from 16 April 2014 to 15 April 2017.

Th plaintiff's claim against the defendants

[4] However, Nirwana Academy Sdn Bhd ('Nirwana Academy') failed to pay the rentals due to the plaintiff and caused the plaintiff to institute proceedings against the said company. Nirwana Academy was wound up on the application of by the plaintiff as seen in the order dated 2 February 2016 by Noorin bt Badaruddin J in the Companies (Winding-Up) Petition No 28NCC-650–08 of 2015.

[5] Thereafter, a new tenancy agreement was entered between the plaintiff and the first defendant. The said tenancy agreement was also secured by a guarantee given by the second defendant.

[6] This new tenancy was for a period of 11 months beginning from 1 May 2016 to 15 April 2017 with an automatic renewal of a further two consecutive terms of three years each and a final term of one year. The new tenancy was also for the same premises that were originally rented to Nirwana Academy.

[7] The plaintiff alleges that the defendants did not pay the rentals and all sums due to it under the terms of the above-referred tenancy from its inception till to date despite reminders and monthly statements have been issued to the first defendant.

[8] The plaintiff further alleges that the first defendant had attempted to wrongly terminate the tenancy by issuing the letter dated 12 April 2017, the first defendant had attempted to terminate the tenancy for the ground floor, mezzanine floor and the ninth floor but chose to retain the tenancy for the 22nd and 23rd floor. The plaintiff has since rejected the said termination by letter dated 14 June 2017.

[9] The plaintiff through its solicitors did issue a letter of demand dated 3 October 2018 demanding that the defendants pay to the plaintiff the sum of RM4,596,510.20 being the outstanding rentals, sewerage charges, and interest due pursuant to the terms of the above-referred tenancy agreement. The sum of RM4,596,510.20 is allegedly due for the period between May 2016 to September 2018 from the first defendant to the plaintiff.

[10] The plaintiff had earlier attempted to obtain a summary judgment against the defendants. This application was dismissed by this court as the defendants have shown several issues that should be determined at trial.

[11] Since then, the plaintiff chose to terminate the tenancy agreement as seen in the letter dated 28 April 2021 issued by its solicitors. The plaintiff has also demanded that the first defendant redeliver vacant possession of the rented premises in their original condition. The plaintiff further requires that the said premises must be delivered in good and tenantable condition as required under the terms of the tenancy agreement.

[12] The plaintiff further contends that the defendants have since failed to redeliver vacant possession of the premises in the manner prescribed by the tenancy agreement.

[13] The second defendant has since been adjudicated bankrupt. The plaintiff has obtained leave from court to proceed with the claim against the second defendant pursuant to the order dated 3 July 2019 in the Bankruptcy Proceedings bearing number WA-29NCC-3520–08 of 2016.

[14] Due to the breach of the tenancy agreement, the plaintiff claims the following against the defendants:

(a) rentals for the period between May 2016 to May 2021 — RM7,700,720.80;

(b) interest accrued as at 9 June 2021 — RM1,906,212.64;

(c) sewerage charges from May 2016 to June 2021 — RM233,514.48;

(d) loss of rentals from 1 June 2021 to 15 April 2024 — RM5,103,050.06;

(e) the defendants is directed to redeliver vacant possession of the premises in their original condition and good tenantable repair within seven days from the date of judgment;

(f) alternatively, an order that the plaintiff be at liberty to carry out the restoration work and the costs of the same to be borne by the defendants subject to the said costs to be assessed by this court;

(g) costs of this proceedings; and

(h) interest.

The defendants' arguments — Defence presented

[15] The defendants defence is summarised as follows:

(a) the tenancy entered by the defendants was forced upon them to ensure that they were able to run Nirwana Academy Sdn Bhd and was part of the settlement of the earlier dispute between the plaintiff and Nirwana Academy Sdn Bhd (defence 1);

(b) the obligation to pay the rentals under the current tenancy agreement will only begin from the date on which the DBKL authorises the defendants to operate its institute of higher education at the said premises and the proposed amendments to the building plans relating to the said units (defence 2);

(c) the first defendant had validly terminated the tenancy agreement for the three floors on 12 April 2017 and it is wrong for the plaintiff to reject the said termination (defence 3);

(d) it is inequitable for the plaintiff to claim for the rentals for the duration of the whole tenancy as well as the renewed tenancy period under cl 9.05 of the tenancy agreement (defence 4);

(e) the plaintiff cannot now claim damages as it had elected earlier to continue with the tenancy instead of termination (defence 5);

(f) the defendants could not deliver vacant possession of the premises as the plaintiff did not allow them access to the premises (defence 6);

(g) the automatic renewal of the tenancy period should not be allowed or approved by court as the defendants did breach the terms of the tenancy by failing to pay the rentals and sums due (defence 7); and

(h) the sums claimed for the three-tenancy period are unfair, inequitable, and constitute a penalty instead of a genuine liquidated amount (defence 8).

DECISION OF THIS COURT

[16] This matter was fixed for trial on 1 to 2 November 2021 and 2 December 2021. The following witnesses were called by the parties to give evidence and to present their version of events:

(a) plaintiff's witness SP1: Tee Yew Boon;

(b) plaintiff's witness SP2: Ar Dr Vadiveloo a/l S Chinnthamby;

(c) defendant's witness SD1: Dato' Manimaran a/l Kanappram; and

(d) defendant's witness SD2: Mr Thanabalan a/l Srimayan.

[17] After considering the written submissions, pleadings, documents, and oral evidence presented to this court, I find that the plaintiff has proven its claim against the defendants. I am of the opinion that the defendants have failed to prove any of their defences raised in the amended defence dated 13 September 2021.

[18] My reasons for allowing the plaintiff's claim and for refusing to accept the defence of the defendants are explained in the following paragraphs.

MY GROUNDS IN DETAIL — WHY I ALLOWED THE PLAINTIFF'S CLAIM AGAINST THE DEFENDANTS

[19] I will deliberate on each of the defence raised by the defendants in the following paragraphs.

The plaintiff has proven the breach of the tenancy agreement

[20] Firstly, I find that the plaintiff has proven that the defendants did commit a breach of the tenancy agreement.

[21] As I have alluded earlier, parties did enter into a tenancy agreement after Nirwana Academy Sdn Bhd was wound up on the petition of the plaintiff.

[22] This new tenancy was undertaken after the representatives of the plaintiff and the first defendant had attempted to resolve the dispute and the amount outstanding to the plaintiff from Nirwana Academy Sdn Bhd. For the defendants, this settlement is essential to enable it to continue running the institute of higher learning in the name of Nirwana Academy.

[23] I shall however not deliberate as to the merits of the issue concerning the settlement of the dispute concerning the first tenancy between Nirwana Academy and the plaintiff as that is within the purview of the High Court hearing the pending claim of *Niwarna Flexi Capital Venture Sdn Bhd v Swiss Planner Sdn Bhd*; *Mutaya Sdn Bhd and Master Platform Sdn Bhd* (Writ No WA-22NCC-131–103 of 2021).

[24] The material terms of the tenancy agreement between the plaintiff and the defendants are as stated in annexure 1.

[25] I find that the defendants, in particular the first defendant, had failed to pay the rentals and all sums due under the terms of the tenancy agreement from its inception.

[26] This is apparent in the invoices issued by the plaintiff to the first defendant from 1 May 2016 to 1 April 2021, the statement of accounts issued from 1 March 2017 to 26 April 2021 and the letters of demand by the plaintiff's solicitors dated 3 October 2018 issued to both the first and second defendants.

[27] Having agreed to pay the rentals for the premises and the other sums due as provided in the tenancy agreement, it is for the defendants to pay the said sums in accordance with the said agreement. I refer to sections 6.01, 7.01, 7.02, 7.03 and 7.05 as well as: (i) sections 4, 5, 6, 7 and 10 of the Second Schedule; and (ii) the Third Schedule of the tenancy agreement.

[28] Even the second defendant, Manimaran a/l Kanappram admits that the rentals have not been paid. This appears to the answer to question 26 of his witness statement.

[29] I will now deal with the defences raised by the defendants.

Defences 1 and 2 — Whether the obligation to pay starts from the date when DBKL grants the approval to operate or when the defendants could operate Nirwana College again

Whose obligation to apply for approval from DBKL

[30] The defendants contend that the rentals are only due from the date when DBKL grants its approval for the first defendant to operate its institute of higher learning.

[31] To support the arguments put forward, the defendants refers to the application filed by the first defendant through its architect, Ar Dr Vadiveloo a/l Chinnathhamby to convert the basement, ground floor, mezzanine, 6, 16 and 17 of Plaza Pengkalan from its current approved use to be utilised for the purpose of operating the said college.

[32] Several documents were produced by the defendants to support this defence:

(a) the application for approval by Ar Dr Vadiveloo a/l Chinnthhamby to DBKL to convert the said floors that were endorsed by the plaintiff, as owners of the building;

(b) the official receipt from DBKL for the sum of RM100 paid by the above-referred architect;

(c) DBKL's letter dated 18 October 2016 refusing to grant the approval to change the use of the basement and the hawker's center on the sixth floor. DBKL decided to maintain the current use of the said floors in accordance with the plan approved by the local authority dated 12 April 1985;

(d) DBKL's second letter dated 19 October 2016 refused the application to change the use of the said floors as requested by the aforesaid architect on behalf of his client;

(e) letter dated 24 November 2016 issued by the first defendant and the email dated 17 November 2016 requesting for the amended plans as approved by DBKL from the plaintiff relating to the basement and the sixth floor;

(f) email from the plaintiff dated 29 November 2016 to the first defendant informing the first defendant that (a) they had liaised directly with the aforementioned architect; (b) forwarded a copy of DBKL's conversion approval dated 22 April 1997; (c) informing the first defendant that DBKL's earlier approval did not include the basement and that this may risk non-approval from DBKL; (d) there is no tenancy with regard to the basement between the plaintiff and the defendants; and (e) seeking payment of the deposits from the first defendant. The plaintiff attached a copy of the building plans as approved by DBKL dated 22 April 1997;

(g) email dated 31 March 2017 issued by Thana Sri Mayan on behalf of the first defendant to the plaintiff seeking the latter to issue the letter drafted by the first defendant on the letterhead of the plaintiff to DBKL. The draft letter is again seeking conversion approval of the floors at issue from its original plan;

(h) the letter dated 31 March 2017 on the letterhead of the plaintiff to DBKL seeking the approval of the said conversion;

(i) DBKL's letter dated 26 April 2017 to the plaintiff granting approval to the said conversion and requesting that the building owner to execute an amended approved plan in accordance with the terms of DBKL's consent; and

(j) DBKL's letter dated 18 May 2017 to the Ar Dr Vadiveloo granting approval for the said conversion with conditions to be complied with.

[33] The defendants also relied on the evidence of the second defendant and Thanabalan a/l Srimayan. I have considered the evidence presented by the aforesaid witnesses:

Manimaran a/l Kanappam:

(a) it was the obligation of the plaintiff to obtain the consent or approval from DBKL to allow the use of the premises rented as centers of higher education based on the application by Ar Dr Vadiveloo (the architect);

(b) failure of the plaintiff to convert the said premises, including the basement, did not allow the first defendant the ability to utilise the said premises for its intended purpose;

(c) therefore, the first defendant did not have to pay the rentals due to the plaintiff under the terms of the tenancy agreement; and

(d) see answers to questions 23, 24, 25, and 27 of Manimaran a/l Kanappam.

Thanabalan a/l Srimayan:

(a) the first defendant could not utilise the premises as the requisite approvals was not forthcoming;

(b) it was the plaintiff who had applied for the said approval through Ar Dr Vadiveloo; and

(c) see answers to questions 13 and 14 of the Thanabalan's witness statement.

[34] However, having considered the evidence referred to at para 33 earlier, I do not find that the statements made by Thanabalan and Manimaran are correct. The representations of the facts contradict the contemporary documents and are contrary to the terms of the tenancy agreement.

[35] I refer to the often-quoted dicta of Robert Goff LJ in *Armagas Ltd v Mundogas (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at p 57 where he stated:

> Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth. I have been driven to the conclusion that the judge did not pay sufficient regard to these matters in making his findings of fact in the present case.

[36] Arden LJ (as she then was) in *Re Mumtaz Properties Ltd; Wetton (as liquidator of Mumtaz Properties Ltd) v Ahmed and others* [2011] EWCA Civ 610, emphasised at para 14 of her judgment that:

> ... contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain

contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

[37] I am further guided by the decision of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd and another* [2013] EWHC 3560 (Comm) where:

22. In the light of these considerations, *the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts*. This does not mean that oral testimony serves no useful purpose — though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. (Emphasis added.)

[38] It is also worth quoting the judgment of Males LJ in *Simetra Global Assets Ltd and another company v Ikon Finance Ltd and others* [2019] EWCA Civ 1413 where he stated:

... I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including emails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, *it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents.* Although this cannot be regarded as a rule of law, *those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence.* The classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at p 57 is frequently, indeed routinely, cited ...

...

It is therefore particularly important that, in a case where there are contemporary documents which appear on their face to provide cogent evidence contrary to the conclusion which the judge proposes to reach, he should explain why they are not to be taken at face value or are outweighed by other compelling considerations. (Emphasis added.)

A **[39]** It is clear to me that under the terms of the tenancy agreement that the obligation to obtain such approvals from any authorities for the use of the premises for the needs of the first defendant lies with the said defendant and not with the plaintiff. I refer to sections 2.02(a), 2.02(c), and 9.01 of the tenancy agreement.

B

[40] I further note that the said witnesses did complain that the said tenancy agreement was drafted by the solicitors for the plaintiff and allege that they were forced to agree to the terms. They repeat that the defendants were not given adequate opportunity to consider the terms and the conditions that C appear in the said tenancy agreement. This theme appears in answers to questions 7 and 8 of the witness statement of Thanabalan and answers to questions 10–17 of the witness statement of Manimaran.

[41] The above testimony of the Manimaran and Thanabalan are contrary to D the terms of the agreement. I refer to s 9.17 of the tenancy agreement which clearly indicates that the defendants had been given sufficient opportunity to seek independent legal advice and that the terms of the agreement would be binding on the defendants.

E

[42] I also find that the application for approval for the use of the relevant premises was undertaken by the first defendant and not by the plaintiff. The architect, Ar Dr Vadiveloo was appointed by the first defendant and not by the plaintiff. The plaintiff had only assisted in the application to enable the F defendants to operate the institute of higher learning at the premises rented. This was explained by Ar Dr Vadiveloo in his evidence in chief which sustained cross-examination by the learned counsel for the defendants.

[43] Another important factor that I have taken into account is that the said G premises were originally rented to Nirwana Academy Sdn Bhd. The defendants admit that they had attempted to settle the terms of the earlier dispute between Nirwana Academy Sdn Bhd and that part of this settlement lead to the execution of the tenancy agreement currently at issue.

H **[44]** If indeed the obligation was with the plaintiff to undertake the said application for approval with DBKL then even at the time, as the approval was not even forthcoming, the defendants should not have proceeded with the new tenancy. Even as of the date of the winding up, after spending substantial sums of monies, the required approvals were not forthcoming from DBKL.

I

[45] I chose to believe the evidence presented by the plaintiff's witnesses, Tee Yew Boon and Ar Dr Vadiveloo to that of the defendants' witnesses. I refer to the answers to questions 35–47 and 53–67 of Tee Yew Boon's witness statement and from the notes of proceedings of the examination in chief and

cross-examination of Ar Dr Vadiveloo. The evidence of Tee Yew Boon was unscathed by the substantial cross-examination by the defendants' counsel and his testimony is consistent with contemporaneous evidence on this issue.

Whether rentals become due when Nirwana Academy Sdn Bhd operates again or whether it was part of the terms of settlement

[46] I do not find that there is any credible evidence that indicates that parties had agreed that the settlement agreement requires that the plaintiff is required to ensure that the defendants were able to run Nirwana Academy Sdn Bhd and that the defendants could utilise the premises as an institute of higher education. This condition did not appear in the said tenancy agreement. If indeed this condition is important, then the defendants would have ensured that it appears in the tenancy agreement. No such clause exists or appears in the said agreement.

[47] Even if it was the second defendant's intention that the tenancy agreement was to enable him to reinvigorate Nirwana Academy, that remains his unilateral intent and this did not appear in the tenancy agreement or any correspondence between parties. As admitted by Mr Manimaran, he was desperate and wanted to reinvigorate the said company from the ashes of winding up and agreed to the proposal by the plaintiff. There is no evidence indicating that the plaintiff agreed to withhold rentals until such time the said institution becomes operational again. The defendants' contention is clearly contrary to the terms of the tenancy agreement.

[48] It is not the function of this court to rewrite the terms of the bargain as recorded in the tenancy agreement.

[49] I refer to the decision of the Court of Appeal in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22 where Raus Sharif JCA (as he then was) stated:

> It is trite law that the court should not rewrite the terms of the contract between the parties that it deems to be fair or equitable. This principle has been clearly expressed in numerous cases (see *Shell Malaysia Trading Sdn Bhd v Lim Yee Teck & Ors* [1982] 2 MLJ 181; [1982] 1 LNS 11; *Wong Pa Hock v American International Assurance* [2001] MLJU 688; [2002] 2 CLJ 267; *M Paikan v YP Devathanjam* [1952] MLJ 58; [1952] 1 LNS 60 and *Charter Reinsurance Co Ltd v Fagai* [1996] 2 All ER 46).

[50] It is also trite law that ss 91 and 92 of the Evidence Act 1950 prohibit the addition may be adduced to contradict, vary, add or substitute the terms of the written instrument unless agreed upon between the parties. I refer to the decision of the Federal Court in *Lee Soh Hua v Kow Lup Piow & Ors* [1984]

A 2 MLJ 101; [1984] 1 CLJ Rep 191.

[51] An objective test of the above-referred clause/sections under the tenancy agreement indicates that the obligations lie not with the plaintiff but that of the defendants. The defendants take the risk of renting out the said premises and even if they could not obtain the approvals from the requisite authorities, the obligation to pay the rents and all sums outstanding to the plaintiff remains binding on the defendants. The whole agreement does not indicate that such an obligation lie with the plaintiff.

[52] I refer to Azahar Mohamed FCJ's judgment (as he then was) in *Wong Yee Boon v Gainvest Builders (M) Sdn Bhd* [2020] 3 MLJ 571; [2020] 2 CLJ 727 where he stated:

> [8] As a starting point, it is important to bear in mind the basic principle of construction of contracts. The basic rule is that effect must be given to the intention of the parties. This requires an objective test and not a subjective approach. It is an objective approach which is required and a solution should be found which is both reasonable and realistic (see *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 592; [2010] 1 CLJ 269). The intention must be sought from the document itself. To ascertain the intention of the parties, the court reads the terms of the contract as whole, giving the words used their natural and ordinary meaning. We have explained this basic principle in the case of *Lucy Wong Nyuk King & Anor v Hwang Mee Hiong* [2016] 3 MLJ 689; [2016] 4 CLJ 813; [2016] 3 AMR 101 as follows:
>
> > [34] ... In this regard, the point which has a strong bearing on the matter is that it is an established principle of construing a contract that, among others, a contract must be construed as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it. Each clause in an ordinary commercial contract should be so interpreted as to bring them into harmony with the other clauses of the contract (see *National Coal Board v WM Neill & Son (St Helens) Ltd* [1984] 1 All ER 555 which was cited in *Royal Selangor Golf Club v Anglo-Oriental (M) Sdn Bhd* [1990] 2 MLJ 163; [1990] 3 CLJ Rep 37 and *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357). In *Australian Broadcasting Commission v Australasian Performing Right Association Limited* [1973] 129 CLR 99, it was held that the whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.
>
> [35] Professor McMeel in *The Construction of Contracts (Interpretation, Implication and Rectification)* (2nd Ed, 2011) explains in clear words this long-standing canon of construction at para 1.73 as follows:
>
> > Both the traditional and the modern approaches to construction stress the importance of having regard to the instrument as a whole. It is important not to fixate on one particular word or phrase and thereby neglect the overall purpose

of the document or to give disproportionate importance to one phrase or clause. This is a long-standing rule.

[36] As stated by Lewison in *The Interpretation of Contracts* (5th Ed) at para 7.02 that in order to arrive at the true interpretation of a document, a clause must not be considered in isolation, but must be considered in the context of the whole of the document. In *Chamber Colliery Company Ltd v Twyerould (1893)* [1915] 1 Ch 268 (note) (which was cited by Lewison), Lord Watson said:

> I find nothing in this case to oust the application of the well known rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

[53] I also refer to the letter issued by the first defendant to the plaintiff dated 12 April 2017. In the said letter, the first defendant did state that they wanted to terminate the ground, mezzanine and the ninth floor but chose to retain the 22nd and 23rd floor based on the rates as provided in the tenancy agreement. The first defendant also wanted to utilise the basement to store their assets but at a reduced rate. There was no mention of any obligation that the rentals will only be paid upon approval being obtained from DBKL.

[54] The response from the plaintiff clearly indicates that the rentals were due and payable irrespective of the pending approval from DBKL. The plaintiff issued a letter dated 14 June 2017 refusing to accept the proposed termination and at the same time informed the defendants that the rentals were outstanding and the applicable interest that would be imposed on the defendants. There was no rebuff from the defendants to indicate or state that these rentals are only due once DBKL approves or when Nirwana is reinstated or reinvigorated.

[55] In the circumstances, I find that contemporaneous documents indicate that the rentals are payable irrespective of the status of the approval from DBKL or the status of Nirwana. The tenancy agreement did not provide for any condition precedent to the obligation to pay the rentals from the defendants to the plaintiff. I find that this is merely an afterthought on the part of the defendants.

[56] Given the above and based on the documents referred above, I find that the defendants have failed to prove the above defences. I reject the said defences and find on the said issues in favor of the plaintiff.

Defence 3 — Whether the defendants had validly terminated the terms of the tenancy via its notice dated 12 April 2017

[57] The next issue raised by the defendants concerns the termination of the tenancy for the ground floor, mezzanine floor and ninth floor of Plaza Pengkalan. The defendants refers to the letter issued by the first defendant to the plaintiff dated 12 April 2017.

[58] I have summarised the contents of the said letter, in the earlier paragraphs, but I will reproduce the contents of the letter for convenience:

> We wish to inform to you that we hereby terminating the Tenancy for the following floor:
>
> ...
>
> However, we wish to retain 22nd and 23rd floor for renewal in the interim pending approval from DBKL, based on the same rates as mention in the our previous Tenancy.

[59] The witnesses for the defendants explained that the first defendant decided to terminate the tenancy for the said floors on the grounds as stated in the letter that: (i) Nirwana Academy Sdn Bhd, the holding company, was wound up; (ii) the inability to obtain approval from DBKL; and (iii) that company has suffered substantial renovation costs which could not be utilised or were under-utilised.

[60] Manimaran, the defendant's first witness also stated that he wanted the company to terminate the tenancies for the above referred floors on the ground that the plaintiff had failed to obtain the approvals to convert the floors to be used by the first defendant as a teaching center for its college of higher learning. As I have said earlier, I do not agree that this obligation lies with the plaintiff, and I do not agree that this is a pre-condition before the rentals become due and payable from the defendants.

[61] I will now deal with the issue of whether the notice to terminate by the first defendant is valid and whether the plaintiff was wrong not to accept the said termination.

[62] The plaintiff contends that the grounds given by the first defendant for the said termination is not valid and that there exists a valid tenancy with an automatic renewal in section 9.05(a) of the said tenancy agreement. I refer to Tee Yew Boon's answer to question 69 of his witness statement.

[63] I agree with the arguments raised by Tee Yew Boon as to the grounds for the termination of the three floors by the first defendant. The grounds relied on by the defendants do not justify the termination of the said tenancy for the three floors.

[64] As I have found earlier, the issue of the continuation or resurrection of Nirwana Education Sdn Bhd is not supported by contemporaneous documents and does not appear in the contract. I have also dealt with the issue of pending approval from DBKL. That obligation lies with the defendants, and it does not preclude the operation or payment of the rentals due to the defendants. This court cannot add or vary the terms of the written instrument as suggested by the defendants.

[65] Therefore, the defendants do not have any valid reason to terminate the said tenancy agreement pertaining to the above referred floors.

[66] It is trite law that where an innocent party is faced with a breach of a material term of the contract by their counterpart, it is open for the former to either terminate the contract and seek damages or affirm the contract and seeks its performance.

[67] Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 held:

> [11] At the heart of this appeal lies the question: what are the rights of an innocent party where there is a breach of contract? The question is one upon which there has been much discussion for about 150 years and the cases decided during that period of time have settled the applicable principles. See *Philpot v Evans* [1839] 151 ER 200, p 202 *Ripley v M'Clure* [1849] 154 ER 1245, p 1251. Nevertheless, cases do arise from time to time that question these settled principles necessitating the courts to re-state them. This case presents us with such an opportunity.
>
> [12] The starting point is to recognise that in an action for breach of contract it is the court that determines who is the innocent party and who is the guilty party. That problem does not arise in the present case because the appellant has freely admitted throughout the proceedings that it is the party that is guilty of having breached the contract. The only issue that remains is whether — as held by the learned trial judge — the respondent as the innocent party is entitled to rescind, the contract, that is to say, to have the parties restored to a position where they will stand as if the contract had never been made.
>
> [13] The doctrine of repudiation is based on the proposition that where a promisor wrongfully repudiates a contract in its entirety, the promisee has a choice. *He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. The rationale is that the primary obligation to perform the promise made is substituted with a secondary obligation to compensate the promisee for the breach.* See *Moschi v Lep Air Services Ltd* [1973] AC 331. *Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promisee — the innocent party — is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. An election once made is irreversible.* See *Sargent v ASL Developments Ltd* [1974] 131 CLR 634, p 655. But it is the essence of the doctrine of repudiation that the breach must go to

A the root of the contract. See *Mayson v Clouet & Anor* [1924] AC 980; *Bowes v Chaleyer* [1923] 32 CLR 159; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26. In the absence of an express refusal to perform, the test is whether the conduct of the contract-breaker is such that a reasonable person would say of it that he has breached his promise in its entirety. See *Freeth v Burr* [1874] LR
B 9 CP 208; *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ Rep 266.

[14] There is another way of stating the proposition. If a promisor does not perform his promise in its entirety, the promisee may terminate the contract. This right of termination was referred to by the common law lawyers of the 19th century as a
C right to rescind. So they wrongly described a broken contract as being voidable. This was incorrect as the breach of a contract does not render it voidable.

[68] I also refer to *Mintye Properties Sdn Bhd v Yayasan Melaka* [2006] 6 MLJ 420; [2006] 4 CLJ 267 where Gopal Sri Ram JCA (as he then was) stated:
D

[8] To paraphrase in less eloquent language the words of Mohamed Azmi SCJ in *Rasiah Munusamy v Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291; [1985] 1 CLJ 541; [1985] CLJ Rep 266, there was an absolute refusal on the part of the defendant to be bound by the original contract (*Freeth v Burr* [1874] LR 9 CP 208
E at p 214). And, in any event, the action of the defendant is to quote from the same learned judge in that case — 'such as to lead a reasonable person to conclude that he no longer intends to be bound by its provisions'.

[9] But a breach is not an actionable breach unless it is accepted by the innocent party to the contract — here the plaintiff. As Seah FJ observed in *Ganam v Somoo*
F *Sinniah* [1984] 2 MLJ 290; [1984] 2 CLJ 268; [1984] 1 CLJ Rep 123:

> A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *brutum fulmen* that
G is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent (per Lord Wright in *Edridge v Sathna* [1933] 60 IA 363).

H [10] So in the state of affairs in which the plaintiff found itself on 29 May 1996, it had a choice: either to treat the contract as at an end or to elect to perform the new contract. This is in accordance with s 40 of the Contracts Act 1950 which reads:

> When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the
I contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

It has been held that the section merely re-enacts English common law. See *Sooltan Chund v Schiller* [1878] ILR 4 Cal 252; *Choo Yin Loo v Visuvalingam Pillay* [1930] 7 FMSLR 135.

[11] For an election to be effective and binding, the innocent party must by words or conduct communicate his decision to the contract breaker. In other words it may be express or implied from conduct. To quote Mason J (later CJ Australia) in *Sargent v ASL Developments Ltd* [1974] 131 CLR 634 at p 655:

> Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*The Queen v Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

[12] Absent an express election, the test for deciding whether the innocent party elected one way or the other is objective. Put another way, it is for the court to infer from the surrounding circumstances of each case as to whether the innocent party elected to affirm in the continuance of the contract or to treat the contract as at an end. So, if, for example, a buyer informs a seller that he will not accept the goods sold and the seller nevertheless attempts delivery, this latter act may be held to be conduct evincing an intention to affirm the contract because the seller is exercising his rights under the contract. See *ABB Distribution Sdn Bhd v GKM Development Development Sdn Bhd* [1998] 7 MLJ 292; [1998] 1 CLJ 1053. However, 'mere inactivity after breach does not of itself amount to affirmation, nor (it seems) does the commencement of an action claiming damages for breach'. See *Chitty on Contracts,* (26th Ed) at para 1702, citing *General Billposting Co Ltd v Atkinson* [1909] AC 118. See also *Desa Teck Guan Koko Sdn Bhd v Sykt Huo Foh Hing* [1994] 2 MLJ 246; [1994] 3 CLJ 172, per Ian Chin J.

[13] To quote once again from Mason J in *Sargent v ASL Developments Ltd*:

> If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier, the affirming party cannot be permitted to change his position once he has elected.

[69] The above propositions remain good law till to date as seen in the

judgment of the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453.

[70] Another important fact that I have taken into account is that the defendants did not deliver vacant possession of the said floors to the plaintiff. If the defendant was adamant in terminating the tenancies for the ground, mezzanine and ninth floors then they should have insisted that vacant possession is given back to the plaintiff. This was confirmed by the Manimaran a/l Kannappram when questioned by this court. He confirms that despite the notice dated 12 April 2017, the keys to the units remain in the possession of the first defendant and were not returned to the plaintiff.

[71] I have also taken into account, the defendants' own conduct after 12 April 2017. There was no instruction given to their architect, Ar Dr Vadiveloo to stop the application for approval from DBKL. In fact, DBKL gave its approval to the proposed changes as seen in the letter dated 18 May 2017 that was addressed to the said architect.

[72] Given the above, I find that the plaintiff is entitled not to accept the termination of the tenancy agreement by the first defendant. I also find that the defendants did not deliver vacant possession of the said three floors to the plaintiff despite the notice dated 12 April 2017. Therefore, the said tenancies continued despite the aforesaid notice from the first defendant.

Whether the defendants are liable for the full term of the tenancies including the renewed terms of the tenancy for the premises

[73] The plaintiff had earlier applied to enter summary judgment against the defendants. This application was dismissed by this court as the defendants had successfully shown a triable issue.

[74] Since then, the plaintiff decided to terminate the tenancy agreement by its solicitor's letter dated 28 April 2021. In the said letter, the plaintiff informed the defendants that:

(a) as of 26 April 2021, the sums of RM9,606,209.19 is due and payable by the defendants to the plaintiff. This sum includes the rentals from May 2016 to April 2021 to the sum of RM7,566,261.49, interest as of 26 April 2021 to the sum of RM1,813,787.70, and sewerage charges of RM226,160;

(b) the plaintiff has chosen to terminate the tenancy due to the default in accordance with section 9.01(ii) of the tenancy agreement; and

(c) the defendants are required to deliver vacant possession and to redeliver the premises to the original condition in accordance with section 7.32 of the tenancy agreement.

[75] The plaintiff has since amended its statement of claim and sought the following remedies from this court:

(i) an order that the first and second defendants shall pay the plaintiff for the said sum of RM7,700,720.80 being the outstanding rentals for the period from May 2016 to May 2021;

(ii) an order that the first and/or second defendants shall pay the plaintiff the said sum of RM1,906,212.64 being the interest accrued on the outstanding rental calculated as at 9 June 2021 under the tenancy agreement;

(iii) an order that the first and/or second defendants shall pay the plaintiff the said sum of RM233,514.48 being the sewerage charges for the period from May 2016 to June 2021 (and continuing until redelivery of the vacant possession of the demised premises in their original condition and good and tenantable repair to the plaintiff);

(iv) an order that the first and/or second defendants shall pay the plaintiff the said sum of RM5,103,050.06 being the loss of rental from 1 June 2021 until 15 April 2024 suffered by the plaintiff;

(v) an order that the first and/or second defendants shall redeliver vacant possession of the demised premises in their original condition and good and tenantable repair to the plaintiff within seven days from the date of the judgment;

(vi) in the event of default of the above paragraph, an order that the plaintiff shall be at liberty to carry out the restoration works on behalf of the first and/or second defendants to restore the demised premises to their original condition and good an tenable repair with the costs of such restoration works to be assessed by a proper officer of this honourable court, as and when arising, and paid by the first and second defendants to the plaintiff;

(vii) an order that the first and/or second defendants to pay the plaintiff the costs of this action and all other incidental costs arising thereby on a full indemnity basis;

(viii) interest on the judgment sum in prayer (i) from 10 June 2021 until the date of full realisation at the rate of 10%pa to be paid by the first and/or second;

(ix) interest on the judgment sum in prayer (ii) from the date of the judgment until the date of full realisation at the rate of 5%pa to be paid by the first and/or second defendant; and

(x) interest on the judgment sum in prayer (iii) from the date of the judgment until the date of full realisation at the rate of 10%pa to be paid by the first and/or second defendant.

[76] As the plaintiff has amended its claim, I am of the opinion that the issue of whether the defendants should be required to pay the full rentals up to its final date should be dealt together with the other defenses raised by the defendants.

Defence 5 — Doctrine of election — Whether the plaintiff is entitled to terminate the tenancy

[77] An interesting argument put forward by the defendants concerns the doctrine of election. The defendants contends as the plaintiff did not accept the earlier termination as stated in the letter dated 12 April 2017, it cannot now terminate the tenancy and claim the damages that arose because of the termination.

[78] This legal proposition is correct in law as seen in the judgment of Gopal Sri Ram JCA (as he then was) in *Berjaya Times Square Sdn Bhd v M Concept Sdn Bhd*. It is worth repeating what His Lordship stated in that case:

> Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*The Queen v Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

[79] However, the application of the aforesaid legal proposition is fact-sensitive. In this case, the plaintiff is not changing its position regarding the earlier termination. To the plaintiff they continue to not accept the earlier termination attempted by the first defendant as seen in the letter dated 12 April 2017.

[80] I find, based on the facts of this case, that the plaintiff's decision to terminate as contained in its solicitor's letter dated 28 April 2021 is valid and is premised on the continued failure by the defendants, in particular the first defendant, to pay the rentals and outstanding due to the plaintiff under the

tenancy agreement. This right is enshrined in section 9.02(a)(iii) and section 9.02(b) of the tenancy agreement. When the first defendant fails to pay the rentals and all sums due to the plaintiff, the plaintiff is entitled to terminate the said tenancy by issuing the appropriate notices in accordance to the aforesaid clauses.

[81] As I have found earlier, the defendants have failed to pay any of the rentals due and all outgoings from the inception of the tenancy agreement. The notice to terminate in the solicitor's letter 28 April 2021, is not dependent on the election made by the plaintiff earlier. The right to terminate arose independently because of the continued failure by the defendants to pay the rentals due. Therefore, I find that the defendants' argument on the inability of the plaintiff to terminate on their reliance on the doctrine of election is incorrect and I reject the same.

Defences 4, 7 and 8 — The plaintiff cannot claim for the full sums due under the original tenancy period and under the renewed tenancies period

[82] The remaining issue raised by the defendants concerns the issue of whether the plaintiff is entitled to claim the full damages sought as reproduced in para 75.

[83] The defendants' argument revolves on the issue of whether: (i) the plaintiff should not be allowed to consider the tenancy automatically renewed in accordance with section 9.05 of the tenancy agreement; and (ii) that the plaintiff should have terminated the said agreement and reclaimed possession at the end of the first or original tenancy period.

[84] The defendants also argue that the said damages sought are inequitable and unfair as the plaintiff should have mitigated its damages by terminating the said tenancy and repossess the parcels from the first defendant.

[85] I will first deal with the issue of whether the said tenancy is renewed or otherwise in accordance with section 9.05 of the tenancy agreement. Section 9.05 is reproduced in Annexure 1.

[86] As I have alluded earlier, it is trite law that the terms of a contract must be considered holistically and must be interpreted objectively. Each of its terms must be considered to determine the meaning of the terms and conditions that appear in the instrument. No terms or provisions appearing in the instrument should be read in a vacuum, they must be harmonised and read in context. This is to ensure that no term be rendered superfluous or meaningless.

[87] After considering the above, I am of the opinion that section 9.05 read

A together with section 9.02 renders the right to decide whether to terminate the automatic renewal of the tenancy lies with the plaintiff. Parties did agree that the tenancy period shall be automatically renewed at the end of the first period until 15 April 2017. This will then be renewed for two consecutive terms of three years each and a final term of one year.

B

[88] The second tenancy period has since been terminated by the plaintiff in accordance with section 9.02. I have considered the correspondence exchanged between the plaintiff's solicitors and the defendants' solicitors dated 28 April 2021, 7 May 2021, 5 August 2021, 13 September 2021, 17 September 2021, C 22 September 2021, 29 September 2021, 30 September 2021, 1 October 2021, 8 October 2021 and 12 October 2021.

[89] I find that the keys to the said premises were only delivered back to the plaintiff on 8 October 2021. The defendants did attempt to deliver the keys D back on 4 October 2021 at the joint inspection of the premises but was rejected by the plaintiff due to the condition of the premises. This was also recorded by Thana Sri Mayan in his email dated 6 October 2021 to the plaintiff and the defendants' solicitors letter dated 8 October 2021.

E

[90] Therefore, the defendants had only returned possession of the premises to the plaintiff on 8 October 2021 when the keys were returned back to the plaintiff's solicitors.

F **[91]** In the circumstances, I find that the defendants are required to pay rentals due to the plaintiff including all charges, which includes but not limited to the sewerage charges, from May 2016 to 8 October 2021. The obligation of the defendants to pay such sums remains until 8 October 2016 when the plaintiff obtain the keys to the said premises back from the defendants.

G

[92] On the issue of the remaining tenancy period, I find as the plaintiff did terminate the tenancy, in accordance with section 9.02(a)(iii) of the tenancy agreement, the remaining tenancy period comes to an end. This is in accordance with section 9.02(b) of the tenancy agreement. The right of the H plaintiff to collect rentals and be paid the sums due to it continues until the possession of the premises or property is given back to the plaintiff by the defendants. As I have said earlier possession was given on 8 October 2021.

[93] I however do not find any clause in the tenancy agreement that entitles I the plaintiff to claim liquidated damages against the defendants.

[94] Under such circumstances, the plaintiff must show to this court that it is entitled to claim for such losses for the remainder of the tenancy period under s 74 of the Contracts Act.

[95] I refer to s 74 of the Contracts Act and the decision of the Court of Appeal in *Cahaya Berlian Sdn Bhd v Bandar Kuala Lumpur* [2021] 1 LNS 839, where Nor Bee Ariffin JCA stated:

> [25] Section 74 of the Contract Act 1950 governs the law on compensation for loss or damage caused by breach of contract (*Toeh Kee Keong v Tambun Mining Company Ltd* [1968] 1 MLJ 39; [1967] 1 LNS 197; the Supreme Court case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76; [1993] 2 CLJ 495; *Malaysian Rubber Development Corporation Berhad v Glove Seal Sdn Bhd* [1994] 3 MLJ 569; [1994] 4 CLJ 783; *Nikmat Masyhur Sdn Bhd v Kerajaan Negeri Johor Darul Ta'zim* [2014] 1 MLJcon 213; [2008] 9 CLJ 46).
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> [26] In *Malaysian Rubber Development Corporation Berhad,* the Supreme Court held that at p 790:
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> > ... It is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v Baxendale* [1854] 9 Exch 341; *Toeh Kee Keong v Tambun Mining Company Ltd* [1968] 1 MLJ 39; [1967] 1 LNS 197; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Anor* [1993] 2 MLJ 76; [1993] 2 CLJ 495 (SC). In essence, the section states that the party may recover any loss or damage for any breach which (a) naturally arose in the usual course of things or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v Baxendale,* which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, of the time they made the contract ...'.
>
> [27] In *Nikmat Masyhur Sdn Bhd,* Vernon Ong Lam Kiat JC (as he then was) explained at p 54:
>
> > [7] In short, the common law rule in the assessment of damages consists of two limbs. The first limb concerns damages flowing naturally, ie, in the normal course of things from the breach. The second limb concerns the damages that the parties at the time of the making of the contract may reasonably be supposed to have contemplated, as the probable result of the breach. This court is also mindful that in the assessment of damages for breach of contract, the general rule is that the aggrieved party be put in the same as if the contract had been performed; so that normally he is entitled to recover from the contract breaker his loss of profits, or the benefit of the bargain, as it is often called (see *Central Malaysia Development Company Ltd v Chin Pak Chin* [1967] 2 MLJ 174; [1967] 1 LNS 15.)
>
> [28] It is elementary that the burden of proving damages or the loss claimed lies with the appellant (see *Guan Soon Tin Mining Company v Wong Fook Kum* [1969] 1 MLJ 99; [1968] 1 LNS 43; *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15; *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; [1990] 1 CLJ 133).

A [29] It must also be borne in mind that it is trite law that in event the appellant failed to adduce sufficient evidence to sustain the appellant's case on the appropriate quantum, the appellant ought to be awarded nominal damages.

B **[96]** I also refer to the recent decision of the Court of Appeal in *Koperasi Kastam Diraja Malaysia Bhd v Yi Go Group Sdn Bhd* [2021] 5 MLJ 590; [2021] 10 CLJ 31.

[97] Lee Swee Seng JCA in that case held:

C [21] To begin with, there are no agreed liquidated damages clauses in the contract. Even if there had been such a clause to the effect that the agreed damages shall be based on the rentals for the unexpired period, that would not necessarily mean that the plaintiff would succeed for the defendant would have the opportunity to adduce evidence to show that such an award would be unreasonable in the circumstances of the case in that it would be over and above the loss suffered by the plaintiff for the D defendant's breach. See the Federal Court case of *Cubic Electronics Sdn Bhd (in liquidation) v MARS Telecommunications Sdn Bhd* [2019] 6 MLJ 15; [2019] 2 CLJ 723 at paras 70 and 71.

[22] Here, there is evidence to show that the storage containers and the two E machines had been removed by the plaintiff from the defendant's premises in early January 2018. See text message at p 51 of encl 3 affidavit in reply of Yap Yee Cheng, a director of the plaintiff.

[23] Surely it would be overcompensating the plaintiff if damages is calculated based on the whole five-year contract period at the agreed rate because the plaintiff F now had the benefit of the ten used storage containers and the forklift and crane in its possession which it could let out to others.

[24] The nature of the items let out appeared to be in high demand where the plaintiff's stock is concerned for it was stated both for the containers and the machine that the supply is subject to availability as can be seen in the first quotation G and second quotation at pp 13 and 15 of encl 3.

[25] On top of that, the plaintiff in being granted the whole of the rentals for the five-year period, would have the benefit of the whole of the contract sum payable under the contract being paid upfront even before the expiry of the contract and just after three months into the contract. That cannot be right and does not compute H with the established principles of assessment of damages for a breach of contract.

[26] What we can say here, and we do so with the greatest of respect to the learned High Court Judge, is that the assessment of damages based on the entire period of the contract and the agreed rates had the contract been carried through to its completion, would be far in excess of the loss suffered and thus inappropriate as I there is no evidence led that the plaintiff could not let out the ten used storage containers, the forklift and the crane after repossession from the defendant.

[27] The Federal Court in *Cubic Electronics* referred to the principle of proportionality in assessing damages and though it was spoken of in the context of a sum stated as agreed damages in the event of a breach, the proportionality

principle would cut evenly across all claims for damages where to grant damages based on loss of revenue for the unexpired balance term of the contract would be excessive and disproportionate to the actual loss that may be suffered. It propounded as follows:

> [68] Consequently, regardless of whether the damage is quantifiable or otherwise, it is incumbent upon the court to adopt a common sense approach by taking into account the legitimate interest which an innocent party may have and *the proportionality of a damages clause in determining reasonable compensation*. This means that in a straightforward case, reasonable compensation can be deduced by comparing the *amount* that would be payable on breach with the *loss* that might be sustained if indeed the breach occurred. Thus, to derive reasonable compensation, there must not be a significant difference between the level of damages spelt out in the contract and the level of loss or damage which is likely to be suffered by the innocent party. (Emphasis added.)

[28] We are of the considered view that to allow damages based on the amount to be collected for the entire term of the contract of five years would be disproportionate and excessive. Instead of compensating the plaintiff for its loss, it would be causing the plaintiff to profit from its loss which is not the principle in awarding damages upon a breach of a contract.

[98] His Lordship went on to state:

[31] The first limb of s 74(1) of the Contracts Act 1950, deals with direct loss and the second limb with indirect loss. Here we are concerned only with direct loss, for it was not alleged that the plaintiff's loss falls within that which the parties knew, when they made the contract, to be likely to result from the breach.

[32] The Federal Court in *Toeh Kee Keong v Tambun Mining Company Ltd* [1966] 1 MLJ 39; [1967] 1 LNS 197 at p 40 (MLJ) expounded the s 74(1) of the Contracts Act 1950 as follows:

> The rule lays down the main principles as follows:
>
> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

In more compendious terms the rule has been restated by Asquith LJ in *Victoria Laundry (Windsor) Ltd Newman Industries Ltd* [1949] 2 KB 528 539 in a passage which I shall quote in full:

> (a) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim Chicoutimi Pulp Co* [1911] AC 301.) This purpose, if relentlessly

pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

(b) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(c) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(d) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in *Hadley v Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things', of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss also recoverable.

(e) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *Monarch Steamship Co Ltd Karlshamns Oljefabriker (A/B)* [1949] AC 196).

(f) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge that defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at p 158, if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger'. For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy.

[33] The burden of proof is on the party claiming damages. In *Ban Chuan Trading Co Sdn Bhd v Ng Bak Guan* [2004] 1 MLJ 411; [2003] 4 CLJ 785, the Court of Appeal reiterated as follows:

> The burden of proving the damages is always on the parties claiming the damages. In *Tan Geok Khoon & Gerard Francis Robless v Paya Terubong Estate Sdn Bhd* [1988] 2 MLJ 672; [1987] 1 LNS 79 at p 680, Edgar Joseph Jr J (as he was then) said:

This brings to my mind the famous words of Lord Goddard in *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: This is what I have lost, I ask you to give me these damages'. They have to prove it.

Thus, in *Ashcroft v Curtin* [1971] 1 WLR 1731, a plaintiff claiming for diminution in the profits of his one man business could not succeed in this claim though the evidence pointed to a decrease in profitability which 'was due to the injury, the records kept being too rudimentary and the accounts too unreliable to quantify the loss'.

[34] The compensation here is for the loss or damage which naturally arose in the usual course of things from the breach. Under s 74(1) of the Contracts Act 1950 and the first limb thereof, the plaintiff is allowed to claim for losses that arise naturally from the breach. That would involve the loss arising from not being able to let out the items repossessed to another customer or perhaps letting them out at a lower rate or perhaps only being able to let out intermittently.

[35] Instead, the plaintiff here is claiming for the loss of revenue as general damages for the revenue it would have grossed in if the contract has been allowed to operate for its full five-year term.

[36] The question is whether that is allowed in law in the circumstances of this case.

...

[42] This may include the costs incurred in advertising for letting these containers and machines and the number of days that these items were left idling in the warehouse. In a case where the plaintiff had let these items out but at a lower price than that quoted for and agreed to by the defendant, the plaintiff could produce evidence of it and sue for the difference in the rates. However, there was no such evidence.

[43] Even in cases where the containers and the machines are not let out at all because there was no demand for them at all, the plaintiff would only be able to claim the loss of profit and not the loss of revenue from the rental, which it could have obtained for as stated earlier, there is the costs element in all businesses, whether it be fixed or variable costs or a combination of them.

[44] The ordinary meaning of profit is that one should deduct one's costs from the revenue to be collected. Here the plaintiff had not disclosed his costs which may well include the costs of financing of the containers, the forklift, the crane, insurance and maintenance. After all, the containers are used containers and not brand new ones tailored to the defendant's needs.

A [45] There is also the element of costs for operating the forklift and the crane because the rental rates quoted include the plaintiff's appointed staff who alone can operate the machine as stated in Appendix 1A under 'general terms and conditions of supply and service' under 'B Operator' where is it stated: 'Only Yi Go Group Sdn Bhd appointed staff/operator can operate the equipment/machine'.

B ...

[47] Time and again, this approach of claiming for the balance of the amount that could be collected for the balance period of a contract for work to be done or rental to be collected or a combination has come before our courts. The Court of Appeal C in *Lay Hong Food Corporation Sdn Bhd v Tiong Nam Logistics Solutions Sdn Bhd* [2018] 2 MLJ 66; [2017] 10 CLJ 680, when presented with such a claim, had this to say:

> [48] On another note, the basis of the claim by the plaintiff (TN Logistics) for damages for loss of profits is based on an average of sales multiplied by six D months. The plaintiff (TN Logistics) is relying on the average gross sum of the invoice value. This cannot be an accurate figure as overhead costs such as petrol, the costs of hiring of drivers, operation costs and maintenance has to be factored in, to arrive at a net figure. Only then can a realistic profit figure be arrived at. To allow such a manner of calculation as adduced by the plaintiff (TN Logistics) would be to allow the plaintiff (TN Logistics) to claim for more than what it was E entitled to, which is plainly wrong. The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177 had occasion to deal with this point when it held that:
>
> > However, we do not approve of the appellant's method of calculation for F the loss of profits ...This calculation does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. *To award damages based on commissions would completely disregard the fact that had* G *the contract been properly performed the appellant would have had to incur expenses and costs of operation, among other things. The proper sum should therefore be net of all the expenses that would be reasonable incurred in the remaining 20 month period*. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved. (Emphasis added.)

H

[48] The Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 463; [2016] 1 CLJ 177 further explained the need to determine the loss of profit for an unexpired term of a contract as follows:

I

> [119] This calculation (based on commission) does not reflect the principles of compensation for loss of profits and will put the appellant in a position well beyond that which it would rightfully be in, had the contract been properly performed. A calculation based on 'commissions', that is to say receipts, is very different from a calculation based on 'profits'. To award damages based on commissions would completely disregard the fact that had the contract been

properly performed the appellant would have had to incur expenses and costs of operation, among other things. *The proper sum should therefore be net of all the expenses that would be reasonably incurred in the remaining 20 month period. To do otherwise would give the appellant more than they would have obtained had the contract been performed, and therefore more than what they rightfully deserved*. However, contrary to the respondent's submission and the judgment of the trial judge, the mere fact that the formula was the appellant's own formulation (presumably in contradistinction with a formula provided for within the contract) is not a ground for rejecting the formula. The agreement did not stipulate a formula for calculating loss of profits, and as such the general principles of the common law will apply and a formula that best estimates the future loss of profits will be preferred by the court. (Emphasis added.)

[49] The plaintiff had steered clear in not disclosing that and preferring to be put in a position where the contract had not been breached. If that be the case then the plaintiff should not have taken back possession of the containers and the machines but just to sue based on the rental that it could have obtained but being able to get it in advance and before the expiry of the contract term for breach by the defendant.

[99] Similarly, in this case, I find that the plaintiff is not entitled to claim for the loss of rentals for the remainder of the outstanding tenancy period. The plaintiff should have produced evidence to indicate the difference or the loss of profits that it would have had if the tenancy agreement was brought to its eventual fruition and the defendants had complied with the terms. The plaintiff is not entitled to claim for the full rentals after 8 October 2021 to May 2024. It should have produced evidence of the loss of profits or the difference in the rentals that it could now obtain based on current market rates compared to those agreed by the defendants. After all, the premises are now in the control of the plaintiff and if this court were to grant damages for the full rentals there is a danger that the plaintiff would be doubly compensated for the said premises.

[100] Given the above, I agree with the defendants' counsel arguments that damages should not be granted for the full tenancy period. I limit it up to 8 October 2021 as the plaintiff has failed to show the loss of profits for the remainder of the period of the renewed tenancy up to May 2024.

Defence 6 and the issue of vacant possession

[101] I also note that the plaintiff contends that the state of the premises returned by the defendants is not to the standard expected under the terms of the tenancy agreement. Section 9.01 of the tenancy agreement indicates the admission by the defendants that when the premises were given to the first defendant, the units were in good order and satisfactory condition. This clause also appeared in the earlier tenancy agreement entered between the plaintiff and Nirwana Academy Sdn Bhd.

[102] Section 7.32 of the tenancy agreement also requires that the first defendant must surrender the premises rented in a state of good tenantable repair and that the first defendant must restore the premises to its original condition if any alterations or additions were made. I also note that Manimaran a/l Kanappram admits that Nirwana Academy Sdn Bhd did undertake substantial alterations and renovation work to the said premises in particular to the 22nd and 23rd floor of the building. The invoices issued by Axisjaya Sdn Bhd and SY Design Sdn Bhd to Nirwana Academy Sdn Bhd were also produced by the defendants.

[103] The list of defects to the premises and unit rented were also produced in the letter dated 12 October 2021 from the plaintiff's solicitors to the defendants' solicitors. The list of defects shows the damage to the premises and to the units rented out by the defendants. Pictures of the defects were also shown and produced to this court to show the extent of the damage done to the premises.

[104] I note that the defendants have refused to honor with the first defendant's obligations under section 7.32.

[105] In the circumstances, I find that the plaintiff is entitled to an order allowing it to make such repairs on behalf of the defendants and then claim the amount paid by the plaintiff to rectify the premises and units to its original state. The plaintiff will then be required to file the necessary assessment application to determine the amount payable for the said rectification work to be undertaken due to the default by the first defendants.

[106] On the issue of vacant possession, the defendants contend that they were not given access to the premises. They refer to the email exchange between Thanabalan and the plaintiff to remove the items that were retained on the 22nd and 23rd floor.

[107] I find that those issues are now academic as the plaintiff has since terminated the tenancy. The defendants have also released the premises back to the plaintiff. What remains are the rentals, outgoings and all such sums payable to the plaintiff and the repairs that must be undertaken to the said units by the defendants. These issues have been dealt with by me in the earlier paragraphs.

Liability of the second defendant

[108] I now turn to the issue of the liability of the second defendant. As the first defendant did fail to comply with its obligations under the terms of the tenancy agreement, the plaintiff is entitled to demand payment from the second defendant in accordance with section 9.22 of the said agreement.

[109] The second defendant agreed to pay on demand the sums outstanding from the first defendant, if the latter fails to comply with its legal obligations. This is clearly provided in section 9.22 of the tenancy agreement that was also executed by the second defendant.

[110] However, as provided under the terms of the tenancy agreement, the liability of the second defendant must be preceded by a demand of the sums outstanding to him. Save for the letter dated 3 October 2018, no other demands were made against the second defendant. The clause also makes it clear that the sums due first defendant must be preceded by a demand to the second defendant before it becomes due and payable by the second defendant.

[111] I also note that in the subsequent demands issued by the plaintiff's solicitors to the defendants' solicitors, no demands were issued personally to the second defendant in the capacity as guarantor and neither did this issue was raised by the plaintiff's solicitors.

[112] Under those circumstances, I am constrained to only grant damages to the sum of RM4,596,510.40 as demanded in the letter dated 3 October 2018 against the second defendant.

ORDERS OF THIS COURT

[113] I find that the plaintiff has shown based on the statement of accounts that the first defendant should be ordered to pay:

(a) the sum of RM7,700,720.80 being the outstanding rentals for the period up to 31 May 2021;

(b) the sum of RM573,593 being the outstanding rentals for the period from 1 June 2021 to 8 October 2021;

(c) the sum of RM1,906,212.64 being the interest accrued on the outstanding rental calculated as at 9 June 2021 under the tenancy agreement;

(d) the sum of RM233,514.48 being the sewerage charges for the period from May 2016 to June 2021;

(e) interest on the total judgment sum from the date of the judgment until the date of full realisation at the rate of 5%pa to be paid by the first defendant;

(f) I also make the order that the second defendant be ordered to pay the plaintiff the sum of RM4,596,510.40;

(g) the defendants pay to the plaintiff costs of the proceedings to the sum of RM50,000 subject to allocator; and

(h) I further make the order that the plaintiff shall be at liberty to carry out the restoration works on the premises rented out to restore the demised premises to their original condition and good tenable repair with the costs of such restoration works to be assessed by this court on an application by the plaintiff, as and when arising, and paid by the first and second defendants to the plaintiff.

ANNEXURE 1

(i) Section 2.01

DECLARATIONS

The parties hereto declare that;

(a) there exist no other agreement (s) which can, may or shall be capable of amending, varying, cancelling, enlarging, restricting, annulling, waiving or altering any of the terms and conditions hereinbefore and hereinafter contained or as a condition precedent or subsequent to this Agreement;

(b) the Schedules and Annexure annexed hereto shall constitute and form integral part of this Agreement and shall be read together with this Agreement;

(c) no acts of the Landlord or its agents and/or servants, irrespective the nature of the act, including acts or condonation, acquiescence, waiver, extension, deferment, or novation shall be capable of converting, varying altering, amending, enlarging, cancelling, annulling, restricting or waiving any of the terms and conditions herein set out and shall not be capable of being or tantamount to an estoppel in law or in equity.

(ii) Section 2.02

The Tenant hereby declares that The Tenant has:-

(a) obtained and shall maintain at its own expense all the requisite governmental approvals, permits, registrations, licenses and other complements (including trade name) necessary to carry on the Tenant's Business and warrants that it has complied with all the requirements and impositions of the law and the appropriate authorities and if the Tenant fails to obtain or maintain the licenses, permits or any other consents for the operation of its business before, during or at any time of this Tenancy, the Landlord will be at liberty to terminate the Tenancy and let out the Demised Premises to other parties without further reference to the Tenant and in such case the Deposit shall be forfeited to the Landlord in accordance with Section 5.04 (a) hereto ;

(b) sufficient and adequate insurance coverage with reputable insurance companies covering all risks (including but not limited to the renovation works to be conducted at the Demised Premises), inter alia, public

liability, fire and any other claims in respect of any injuries caused to any visitors or invitees or persons lawfully present in the Demised Premises;

(c) agreed that The Tenant has inspected the Demised Premises and the floor plan and is satisfied with the accuracy of the same and in assessing, computing and measuring the area of the Demised Premises, the actual area comprising the Demised Premises measured to the external face of walls enclosing the Demised Premises at floor level including toilets, staircases and landings, lift well and lobbies, corridors, plant rooms, cleaners' room, cupboards, service core, floor space with headroom less than 1.5 meters, columns, load bearing, and non-load bearing, partitions, and other structural constructions and assessment to determine the area of the Demised Premises PROVIDED ALWAYS that the Landlord may, at its sole discretion round-up to the nearest unit of square feet or in the alternative to the nearest decimeter AND FURTHER PROVIDED ALWAYS that upon and in the event of the issuance of the relevant strata titles, the area specified therein shall be conclusive and binding on the parties hereto.

(iii) Section 4.01

AGREEMENT FOR TENANCY

The Landlord hereby grants and the Tenant accepts a tenancy of the Demised Premises together with the use and enjoyment in common with other persons entitled thereto of the entrances, vestibules, staircases, landings, corridors , passage, lifts, water closets, lavatories and conveniences and other like amenities (during such hours) as the same shall be in operation for a term stated in Section 2 (a) and (b) respectively of the Second Schedule hereto subject to the terms and conditions hereinafter contained ('the Term').

(iv) Section 5.01

RENTALS AND REINSTATEMENT OF DEPOSIT

The Tenant shall on or before the execution of this tenancy agreement pay the Landlord the Rental Deposit and the Reinstatement Deposit as and by way of deposit or security for the due performance and observance by the Tenant of all and singular the several covenants conditions and agreements on the part of the Tenant contained herein.

(v) Section 6.01

RENTAL

The Rental for the Demised Premises shall be a sum more particularly stipulated in Section 4 of the Second Schedule hereto which monthly rental is payable in advance, whether formally demanded or nor and without any deduction or right of set-off whatsoever, the first of such monthly Rental shall be made on or before the date more particularly stipulated in Section 6a of the

Second Schedule hereto and thereafter on or before the date more particularly stipulated in Section 6b of the Second Schedule hereto.

(vi) Section 6.02

The rental shall be paid by the Tenant to the Landlord or to the property managers appointed by the Landlord and as notified to the Tenant in writing. The parties hereto agree that the said property managers shall be entitled to communicate with the tenant and to collect the rentals from the Tenant and the Landlord hereby agrees that a valid and authorised receipt issued by the said property manager shall be sufficient discharge on behalf of the Landlord.

(vii) Section 7.01

PAYMENT OF RENTAL

The Tenant shall pay the reserved or any revised Rental and Deposit at times and in the manner aforesaid.

(viii) Section 7.03

PAYMENT OF INTEREST ON ARREARS OF OUTSTANDING RENTAL AND SERVICE CHARGES

The tenant shall pay to the Landlord interest on arrears of outstanding Rental and Service Charges (which in this context herein, means rental and service charges not paid in accordance with Section 6.01 above) at a rate stipulated in Section 7 of the Second Schedule hereto calculated from day to day from the date such amount becomes payable until the date of full payment PROVIDED ALWAYS that such interest shall in no way prejudice the Landlord's rights and remedies specified in Section 9.02 (b) thereof.

(ix) Section 7.05

PAYMENT FOR UTILITIES AND SEWERAGE CHARGES

(a) The Tenant shall pay to the Landlord or the appropriate authority all charges for electricity and water as shown in the separate meter installed in respect of the Demised Premises, telephone and telephone installation charges and any other services supplied separately to the Demised Premises and charged against the Tenant.

(b) The Tenant shall pay to the Landlord within seven (7) days from the date of receipt from the Landlord the sewerage charges payable to Indah Water Konsortium Snd Bhd and or its successors in title a sum calculated in accordance with Section 10 of the Second Schedule and the Tenant hereby agrees that the Landlord's determination of such rate of sewerage charges shall be final and binding on the Tenant.

(c) The Tenant shall upon vacating the Demised Premises is responsible for payment of all utilities, sewerage charges and outgoings consumed at the

Demised Premises and shall indemnify and keep the Landlord indemnified against any outstanding due and owing to the Landlord and/or the relevant Appropriate Authority during the course of the Tenancy.

(x) Section 7.08

STRUCTURAL OR MATERIAL ALTERATIONS

The Tenant shall not make or permit to be made any alterations or additions to the Demised Premises or any of the Landlord's fittings of fixtures (including but not without limiting the generality of the foregoing any partitions and floor coverings) in the Building without first obtaining the written consent of the Landlord. Should any damage be done by the Tenant its agents or servants to the Demised Premises or any part thereof by the installation use or removal of any equipment partition sign or other fittings to repair forthwith and make good for such damage to the satisfaction of the Landlord at the Tenant's own cost and expense.

The Tenant hereby agrees and undertakes to indemnify and keep the Landlord indemnified at all times and from time to time for and against all claims demands fines penalties suits proceedings liabilities costs and expenses losses and damages suffered and or to be suffered by the Landlord arising from or in connection with the aforesaid renovation, alteration and or upgrading works.

(xi) Section 7.31

TO PERMIT INSPECTION PRIOR TO DETERMINATION OF TENANCY

At any time during the three (3) calendar months immediately preceding the determination of the Term hereby granted to permit intending tenants and/or others with written authority from the Landlord or its agents at all reasonable times of the day and after reasonable notice has been given to enter and view the Demised Premises.

(xii) Section 7.32

ON DETERMINATION OF TENANCY

(a) On the determination of the tenancy, the Tenant shall quit and deliver vacant possession of the Demised Premises to the Landlord forthwith and promptly together with all fixtures, fastenings, matters and things in anyway attached to and belonging or appertaining hereto in such good and tenantable repair as shall be in accordance with the covenants of the tenant hereinbefore contained with and all locks and leys complete and if so requested by the Landlord to restore the Demised Premises to its original condition if any alterations or additions have been made. Such restoration to be carried out by the tenant at its own cost and expense under the supervision of the Landlord's Architect or other agent

A concerned. In the event of such restoration not being completed upon determination of the tenancy the Landlord shall be at liberty to carry out such restoration and the cost and expense thereto shall payable by the tenant to the Landlord upon demand together with the rent for such extra days taken for such restoration calculated proportionately based on the monthly rental hereinbefore reserved without prejudice to other rights and remedies provided herein or available in law to the Landlord.

(b) The Landlord shall not be liable to repay the Tenant the cost and expense incurred by the Tenant on any improvements made by the Tenant to or in the Demised Premises and the Tenant shall not be entitled to claim for any reduction in the rent on account of such cost and expense incurred by the Tenant.

(xiii) Section 7.33

DOUBLE RENTAL

Without prejudice to Section 9.02 (b) hereof, if the Tenant holds over and continues to occupy the Demised Premises beyond the expiration of the term hereby created or the termination of this Agreement howsoever without the Landlord's consent, or fails to remove the Tenant's fixtures or to give up keys to the Demised Premises, the Tenant shall without prejudice to the rights of the Landlord in law under this Agreement pay to the Landlord a monthly sum calculated at double the last prevailing rate of rental under this Agreement until the Demised Premises is redelivered to the Landlord in the manner provided in this Agreement. For the avoidance of doubt, it is hereby understood that there shall be no renewal of this Agreement by operation of law.

It shall be lawful for the Landlord to call in contractors to remove the fixtures and partitions on the Tenant's behalf and all costs of such work shall be debt due to the Landlord and recoverable by the Landlord by setting off the said sums together with other changes for any defects and damage caused to the Demised Premises against the Deposit referred to in Section 5.01, Section 5.02 and 5.03 hereto PROVIDED ALWAYS that this shall not to be deemed to be a waiver of any of the Landlord's rights whether herein contained or by law to recover any of the aforesaid sum and costs or balance thereof.

(xiv) Section 7.34

REMOVAL OF FURNITURE ETC

The tenant shall not in any time remove or permit to be removed any furniture or fittings from the Demised Premises (whether such furniture or fittings be the property of the tenant or any other person) except with the prior written permission of the Landlord, who shall be notified fourteen (14) days in advance and the Tenant shall make good at its own costs any damage caused to the Demised Premises or Building due to such removal.

(xv) Section 9.01

POSESSION OF THE DEMISED PREMISES

(a) The acceptance of physical possession of the Demised Premises by the Tenant shall be treated as conclusive evidence against the tenant that the Demised Premises are in good order and satisfactory condition as on the date of such possession and as from the date of delivery of the Demised Premises to the Tenant, the Demised Premises shall be at the sole risk of the Tenant as regards to any losses or damages by fire or other accident/perils whatsoever.

(b) The Landlord does not expressly or impliedly warrant that the Demised Premises are now or will remain suitable or adequate for all or any of the purpose of the Tenant and all warranties (if any) as to suitability and adequacy of the Demised Premises implied by law are hereby expressly negated.

(xvi) Section 9.02

TERMINATION AND DISCHARGE

(a) This agreement and the rights conferred to the parties hereto by virtue of this Agreement may be determined, discharged, terminated, cancelled, withdrawn or annulled in any one or more of the following events:-

(i) effluxion of time;

(ii) any sum(s) of money or part thereof due and payable under this Agreement remains unpaid for a period of seven (7) days after the same have become due and payable (whether demanded or not);

(iii) the Tenant failing to observe or perform any of the terms and conditions, stipulation and regulation of this Agreement on its part herein contained;

(iv) the Tenant, its agents and/or servants failing, neglecting, omitting, refusing or inadvertently not observing or conforming to all the rules and regulation laid down by the Landlord from time to time with regard to the Building;

(v) a Receiving Order in bankruptcy being made against the Tenant;

(vi) the Tenant committing an act of bankruptcy, including, execution of an assignment for the benefit of its creditors or executing a bill of sale of its effects for the benefit of its creditors;

(vii) the Tenant's goods and effects being attached in the course of an execution of a judgment, or an attachment being threatened to be levied or pursuant to an order for distress;

(viii) the Tenant allowing a judgment against it to be unsatisfied;

(ix) a petition being presented to wind up the Tenant;

(x) the Tenant resolving being appointed for the Tenant by a creditor;

(xi) the Tenant or its agent(s) and/or servant(s) doing or committing any act or thing which act or thing, in the sole opinion of the Landlord, may directly or indirectly prejudice the Landlord's rights and interests;

(xii) the Tenant or its agent(s) and/ or servant (s), permitted assign (s), successors-in-title, engaging in any activity that the Landlord may regard as immoral, illegal or repugnant to the commonly held beliefs of other tenants in the Building whether such beliefs are based on social, religious or cultural grounds.

(b) In any one or more of the events set out in Section 9.02 (a) hereabove happening, it shall be lawful for the Landlord, without prejudice to other rights and remedies provided herein or available in law to the Landlord, to forthwith re-enter upon and take possession of the Demised Premises without further reference to the Tenant and the Landlord shall further be entitled to seal off the entrance to the Demised Premises and/or stop all supply of water and electricity to the Demised Premises and thereupon the tenancy created and granted herein to the Tenant shall absolutely cease and determine save for the settlement and adjustments accounts between the parties hereto and without prejudice to the rights of action of the Landlord in respect of any antecedent breach of this Agreement or stipulation and regulations herein contained and imposed on the Tenant.

(c) Acceptance of rent or any other payment by the Landlord shall not be deemed to operate as a waiver by the Landlord of any right of action against the Tenant in respect of any breach of any of its obligations hereunder.

(d) The Tenant hereby covenants that in the event that the Tenant intends to terminate the tenancy hereby created before the effluxion of time, the Tenant shall pay to the Landlord as agreed liquidated damages the rents for the unexpired term and upon payment by the Tenant. The Deposits mentioned in Section 3 (a) and (b) of the Second Schedule herein shall thereafter be dealt with in accordance with the provision of this Agreement.

(xvii) Section 9.05

RENEWAL OF TENANCY

(a) The Tenant hereby requests and the Landlord hereby agrees that the Term as defined in Section 4.01 hereof shall automatically be renewable or further terms as stipulated in Section 8 of Second Schedule hereof from the expiration

of the said Term without the Tenant having to give any notification whatsoever to the Landlord and the rental rate an the rental deposit shall upon such renewal be revised in accordance with / to a rate as mentioned in Section 9 of the Second Schedule hereof but otherwise containing the like covenants and provisos as are herein contained with the exception of the present covenant for renewal Provided at the expiry of the Term hereby created or at the time the new tenancy agreement is executed by both the parties hereto (if applicable) there shall not be any existing breach or non-observance of any covenants on the part of the Tenant herein contained.

(xviii) Section 9.13

NOTICE

Any notice or demand requiring to be served hereunder shall be in writing and shall be sufficiently served on the Tenant and or the Guarantor(s) if delivered to him/them/it or forwarded to him/them/it by prepaid registered post or left at his/their /its last known address and shall be sufficiently served on the Landlord or its agents or forwarded to the Landlord or its agents by registered post. This mode of service shall include service of any court documents and or documents relating to legal proceedings. Any notice sent by registered post shall be deemed to have been served at the time of posting the notice.

(xix) Section 9.17

INDEPENDENT ADVICE

The Tenant and Guarantor and each every one of them hereby covenants and declares that the Tenant and the Guarantor have been advised by the Landlord and seek independent legal advice of the effects and consequence to the Tenant and the Guarantor and each and every one of them of signing this tenancy agreement and the guarantee comprised herein shall be binding on the Tenant and the Guarantor and each and every one of them regardless of whether the Tenant and or the Guarantor have resorted to any such advise.

(xx) Section 9.22

GUARANTEE AND INDEMNITY

(a) The Guarantor, in consideration of the Landlord agreeing upon his request to let the Demised Premises to the Tenant upon terms and conditions contained herein, hereby covenant with and guarantee the Landlord that the Tenant shall pay the rent and other monies hereby reserved on the days and in the manner aforesaid and the Tenant shall duly perform and observe all the covenants hereinbefore on the Tenant's part contained and that the Guarantor will on demand pay, make good to and indemnify the Landlord for and against all losses, damages costs and expenses thereby arising or incurred by the Landlord PROVIDED ALWAYS and it is hereby agreed that any neglect or forbearance of the

Landlord in endeavoring to obtain payment of the rent and other monies when the same become payable or to enforce performance or observance of the several stipulation herein on the Tenant's part contained and any time which may be given by the Landlord to the Tenant shall not release or exonerate or in any way affect the liability of the Guarantors under this covenant.

(b) Further to Section 9.22(a) hereof, the Guarantor shall accept from the Landlord, if required to do so, a tenancy of the Demised Premises for a term equal in duration to the residue then remaining unexpired at the time of the grant of such tenancy to the Guarantor which tenancy shall contain the same Tenant's covenants and the same provisions and conditions in all respects (including the proviso for forfeiture) as are contained in this tenancy on the happening of any of the events as set out in Clause 9.02 hereinabove.

(xxi) The Second Schedule

(Which is to be taken, read and construed as an essential part of this Agreement)

SECTION	ITEM	PARTICULARS
1	The term	
2	a) Commencement Date	1st May 2016 or the date of commencement of business by the Tenant, whichever is earlier
	b) Expiry Date	15th April 2017
3	The Deposit	
	a) Rental Deposit	Ringgit Malaysia Three Hundred Thirty-Nine Thousand Seven Hundred And Five And Sen Ninety (RM339,705.90) only which is equivalent to Three (3) months rental.
	b) Utilities Deposit	Ringgit Malaysia Twenty-Five Thousand (RM25,000.00) only.
	c) Letter Box Key Deposit	Ringgit Malaysia Fifty (RM50.00) only.
	c) Reinstatement Deposit	Ringgit Malaysia One Hundred Thirteen Thousand Two Hundred And Thirty Five Sen Thirty (RM113,235.30) only which is equivalent to One (1) month rental.
		Ground Floor

		Ringgit Malaysia Nineteen Thousand Three Hundred And Fifty Nine (RM19,359.00) only per month payable monthly in advance which is calculated at Ringgit Malaysia (RM3.00) only per square foot;
		Mezzanine Floor
		Ringgit Malaysia Seventeen Thousand Forty Seven and Sen Fifty (RM17,047.50) only per month payable monthly in advance which is calculated at Ringgit Malaysia Two and Sen Fifty (RM2.50) only per square foot;
4	d) Rental	9th Floor
		Ringgit Malaysia Twenty-Five Thousand Six Hundred And Nine and Sen Sixty (RM25,609.60) only per month payable monthly in advance which is calculated at Ringgit Malaysia One and Sen Sixty (RM1.60) only per square foot;
		22nd Floor
		Ringgit Malaysia Twenty-Five Thousand Six Hundred And Nine And Cents Sixty (RM25,609.60) only per month payable monthly in advance which is calculated at Ringgit Malaysia One and Sen Sixty (RM1.60) only per square foot;
		23rd Floor
		Ringgit Malaysia Twenty-Five Thousand Six Hundred And Nine and Cents Sixty(RM25,609.60) only per month payable monthly in advance which is calculated at Ringgit Malaysia One and Sen Sixty (RM1.60) only per square foot;
5	Service Charges	Included in the respective Rental stipulated in Section 4 of the Second Schedule hereof
6	Manner of payment of the monthly Rental	a. The first payment shall be made on or before the execution of this Tenancy Agreement and
		b. Thereafter on or before the 7th day of every succeeding month.
7	Interest Rate	Ten Percent (10%) per annum

8	Duration of the renewed term(Section 9.05)	The term is renewable for further two (2) consecutive terms of Three (3) years each (hereinafter be referred to as '1st Renewal Term' and '2nd Renewal Term' respectively and a final term of One (1) year (hereinafter) called 'the Final term'.
9	The rent, deposit and service charge payable for the renewed term(Section 9.05 (a))	Rental payable for the 1st Renewal Term
		Ground Floor — Ringgit Malaysia Three And Sen Twenty Four (RM3.24) per square foot per month
		Mezzanine Floor — Ringgit Malaysia Two And Sen Seventy (RM2.70) per square foot permonth
		9th, 22nd, and 23rd Floor — Ringgit Malaysia OneAnd Sen Seventy (RM1.70) per square foot per month
		Rental payable for the 2nd Renewal Term
		Ground Floor — Ringgit Malaysia Three And Sen Fifty Six (RM3.56) per square foot per month
		Mezzanine Floor — Ringgit Malaysia Two And Sen Ninety Seven (RM2.97) per square foot per month
		9th, 22nd, and 23rd Floor — Ringgit Malaysia One And Sen Seventy (RM1.70) per square foot per month
		Rental payable for the Final Term
		Ground Floor — Ringgit Malaysia Three And Sen Ninety Nine (RM3.99) per square foot per month
		Mezzanine Floor — Ringgit Malaysia Three And Sen Thirty Three (RM3.33) per square foot per month
		9th, 22nd, and 23rd Floor — Ringgit Malaysia Two And Sen Thirteen (RM2.13) per square foot per month

10	Sewerage Charges	A rate calculated in such proportion as the area of the Demised Premises as stated herein bears to the total lettable area and floor space of the Building.

Plaintiff's claim allowed.

Reported by Dzulqarnain Ab Fatar